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IN THE

SUPREME COURT OF THE UNITED STATES

No. 702

RAPID TRANSIT COMPANY, a Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on October 10, 1961.

CITATIONS TO OPINIONS BELOW.

The two memorandum opinions of the trial Court are unreported and are printed at pages 12 and 23 of the record printed for the Court below, nine copies of which record are submitted herewith. The first report of the Commission containing findings of fact and conclusions of law

and the supplemental report of the Commission containing findings of fact and conclusions of law are printed at pages 7 and 15 of the record. The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, page A1, is reported in 295 F.2d 465.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 10, 1961, Appendix A, *infra*, page A6. A timely petition for rehearing was denied on November 13, 1961, Appendix A, *infra*, pages A6-A7. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). Basis for federal jurisdiction in the first instance is based on the power of the United States of America for the taking of property under eminent domain, the authority for taking being the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and Acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257), and the Acts of Congress approved August 10, 1956 (Public Law 1028—84th Congress, Second Session; 10 U.S.C. 2233 and 2663), August 9, 1955 (Public Law 302—84th Congress), and August 3, 1956 (Public Law 968—84th Congress), which Acts authorize the acquisition of the land, and the Act of Congress approved July 2, 1956 (Public Law 639—84th Congress), which Act appropriated funds for the acquisition thereof.

QUESTIONS PRESENTED.

I.

Is an Appellate Court in a non-jury case, in reviewing findings of fact, required to consider the weight of the evi-

dence, or is such review limited by the rule applicable to a review of findings made by a jury?"

II.

Should not an Appellate Court make its own findings of fact relating to testimony which is uncontradicted, undisputed, unimpeached, and inherently probable in a non-jury case?

III.

If Commissioners in a condemnation action find the best and most advantageous use of property condemned to be in accordance with present zoning regulations where there appears to be uncontradicted and unimpeached testimony on the probabilities of obtaining a change of zoning to a more valuable use, does such action deprive the landowner of his property without just compensation in violation of the Fifth Amendment to the Constitution?

STATUTES INVOLVED.

Since there are no questions involved concerning the power of the United States to condemn the land in question, the Acts of Congress authorizing the condemnation proceedings are not relevant to this petition. The statutory provision relevant is *Rule 52(a) of the Federal Rules of Civil Procedure, Title 28, U.S.C.*, which provides as follows:

"*Findings by the Court*

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing in-

terlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948."

STATEMENT.

A complaint in condemnation was filed by the United States of America in the United States District Court for the District of Kansas against the petitioner February 6, 1958 (R. 1). The statutes authorizing the taking and the basis for federal jurisdiction are set out under Jurisdiction, *supra*, page 2. An order appointing Commissioners was entered January 27, 1959, and trial was held before such Commission on the 25th and 26th days of March, 1959. The Commission filed its findings of fact and conclusions of law on April 2, 1959 (R. 7). The trial court entered a memorandum of decision and order (R. 12) recommitting the report to the Commission with instructions that the findings be amplified so as to indicate the factors considered by the Commission in arriving at the reasonable market value of the land taken. Thereupon a supplemental report of the Commission was made containing additional findings of fact (R. 15). This report

was confirmed and adopted by the trial court in a Memorandum of Decision (R. 23).

In the trial before the Commission, evidence was introduced by the landowner (petitioner) to establish the reasonable probability that the zoning ordinance applicable to the land in question would, on the date of the taking, be changed from "A" zoning, single family residences, to "C" zoning, or multiple dwelling uses. Evidence was introduced by the landowner establishing that the market value of the property would be greater if it were available for multiple dwelling uses. The evidence on the reasonable probability of procuring a change of zoning consisted of the landowner's showing that an application had been made by it in the fall of 1956 to the Zoning Board of the City of Lawrence, Kansas, where the land was located, for Class "D" or commercial zoning of the land taken. The request for such change was denied on the basis of a verbal agreement between the Zoning Board, the City Commission of Lawrence, and officers of the University of Kansas who owned adjoining land, to the effect that such adjoining land would not be zoned for any purpose other than "C" zoning, or multiple dwelling use. At such time an informal invitation was issued to the landowner by the Zoning Board to submit an application for "C" zoning, but no application was made.

The Planning Director of the City of Lawrence testified that in his opinion that on the date of taking it was highly probable that an application for "C" zoning would have been approved (R. 44). Other evidence was introduced by the landowner to establish the verbal agreement above mentioned, and the securing of opinions that such land would be rezoned for Class "C" as of the date of the taking had application been made.

In addition, undisputed documentary evidence was introduced showing that the property immediately adjoining the tract condemned to the south was at the time of taking zoned for Class "D", Commercial Use, under the zoning laws of the City of Lawrence (R. 40, Landowner's Exhibit 2). On the corner immediately southwest of this tract, the area is also zoned Class "D". A 17-acre tract immediately north of the tract condemned, owned by the University of Kansas, was zoned Class "C". The tract condemned was bordered to the west by U. S. Highway 59, and the land west of the highway is outside the city limits and not zoned. The land adjoining immediately to the east of the tract condemned was part of that owned by the petitioner and was included in the tract for which application had originally been made for "D" zoning. The tract adjoining petitioner's land to the southeast was used for a public grade school.

The evidence to establish the reasonable probability of securing a change of zoning from "A" to "C" as of the date of taking was uncontradicted, undisputed, unimpeached, and inherently probable.

In the face of the foregoing evidence, nevertheless, in its supplemental report, the Commissioners stated that the landowner did not sustain the burden of establishing the fact that there was a reasonable probability of rezoning so as to permit the tract taken to be used for multiple

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1 While the evidence on probability of rezoning was uncontradicted and undisputed, the appraisers for the Government testified that the highest and most profitable use to which the property could be put at the time of taking was for single family residences. One Government witness testified that because of the zoning it could not be used for any other purpose (R. 134). However, the Government did not produce any evidence to refute the probability of rezoning submitted by the landowner.

dwelling purposes. The Commission found that the best and most advantageous use of the land was for single family residences in accordance with Class "A" of the zoning ordinances applicable thereto. The trial judge, in his memorandum of decision, adopted the report and supplemental report of the Commission on the basis that he did not have a definite and firm conviction that a mistake had been committed, and further that he should not disturb the findings unless manifestly not supported by the evidence (R. 23 and 24). The Court, however, expressed some dissatisfaction with the award, indicating that on the same evidence he would quite likely have found greater value.

The Court below affirmed the order of the District Court. The Court, in its opinion, while recognizing the uncontradicted nature of the evidence on the probability of rezoning, nevertheless affirmed the award, primarily on the basis that it was within the range of credible testimony, and on the statement taken from another Tenth Circuit decision, *Buena Vista Homes, Inc., v. U. S.*, 281 F.2d 476, 480, a portion of which was quoted in the opinion as follows:

> "* * * This court will not assume the function of retrying the facts. A finding based on sharply conflicting evidence is *conclusively* binding here. In the case at bar there is substantial evidence of value both lower and higher than that fixed by the commission. We may not reweigh that evidence in a de novo review or reverse because the commission adopted a value nearer that of the Government experts than that of the appraisers for Buena Vista * * *." (Emphasis supplied)

REASONS FOR GRANTING THE WRIT.

This decision is of public consequence inasmuch as it concerns the taking of private property by the United States Government. The petitioner contends that it has been deprived of its property without just compensation because of the erroneous rules applied to this proceeding. Because of the alleged incorrectness of the decision below, it should be reviewed by this Court for the following reasons:

I.

It is submitted that the Court of Appeals for the Tenth Circuit has in this decision, and also in some of its other decisions, misconstrued Rule 52(a) of the Federal Rules of Civil Procedure pertaining to appellate review of non-jury decisions in that the Court has applied the same rule applicable to a review of findings made by a trial court as to verdicts made by a jury. In this case both the trial court and appellate court stated that the evidence before the Commissioners could not be reweighed nor the findings thereof be disturbed unless manifestly not supported by the evidence. In effect the court below held that the findings of the Commissioners adopted by the trial court are conclusively binding so long as they are supported by some evidence.

In the opinion the court below cited as stating the correct rule another Tenth Circuit decision decided just a few days prior to the case at bar, *Oneco Corporation* v. *U. S.*, 295 F.2d 461. This case also involved an appeal in a condemnation action where the trial court adopted the award of the Commissioners. The court, in the opinion, stated:

> "It is fundamental and without dispute in the law that an appellate court will not set aside the judgment of a trial court, based upon findings of fact, unless there is in its judgment no substantial evidence in the record supporting the Court's findings. This opinion will not be encumbered by citations of authorities to support this statement of law."

This rule, it is contended, is an incorrect rule applicable to appellate review under Rule 52 (a) pertaining to non-jury cases. While it is true that under Rule 52(a) findings of a trial court cannot be disturbed unless clearly erroneous, it does not mean that the reviewing court cannot consider the weight of the evidence and reject court findings if it is felt that a mistake has been made.

The scope of review of jury findings is necessarily considerably more limited. The right to trial by jury being guaranteed by the Seventh Amendment, no fact tried by a jury shall be otherwise re-examined by the court other than according to the rules of the common law. Such review is necessarily limited to questions of law as distinguished from a jury question of fact. See *Cyc. of Fed. Proc.*, Sec. 67.31. On the other hand findings made by a trial court in a non-jury case are not considered conclusive on appellate review. This Court has so held in *U. S. v. U. S. Gypsum Co.*, 333 U.S. 364, 92 L. Ed. 746. In the opinion it is stated:

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be

judged, had great weight with the appellate court. *The findings were never conclusive, however.* * * *" (Emphasis supplied).

In view of the fundamental difference between review of findings made by a court and findings of a jury, several courts have recognized that evidence sufficient to support a jury verdict may not suffice to support a trial judge's findings. See *Orris v. Higgins*, 180 F.2d 537 (C.C.A. 2, 1950); *Continental Casualty Co. v. Stokes*, 249 F.2d 152 (C.C.A. 5, 1957).

It is submitted that the Court of Appeals for the Eighth Circuit has made the proper interpretation of the scope of review permitted by Rule 52(a). *Magidson v. Duggan*, 212 F.2d 748 (C.C.A. 8, 1954); *Aetna Life Ins. Co. v. Kepler*, 116 F.2d 1 (C.C.A. 8, 1941). In the latter decision the Court, in its opinion, stated:

> "Prior to the effective date * * * of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court. * * *
>
> "The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.
>
> "This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.

"The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court."

It is therefore apparent from the above authorities that an appellate court in reviewing findings of fact in a non-jury case has some obligation to weigh the evidence, and certainly its duties exceed the determination of a question of law as to whether there exists substantial evidence to support the findings in accordance with the rule applicable to review of findings by a jury.

Nevertheless from the decision below and from the *Onego* decision decided by this same Court a few days prior to the decision in question, the Court of Appeals for the Tenth Circuit and other circuits[2] are misconstruing Rule 52(a) and applying the same rule applicable to appellate review of a trial court finding as to a jury finding. Thus a trial court's finding is considered conclusively binding if supported by some evidence the same as is a jury finding. Not only is this a misconstruction of Rule 52(a), but also a digression from the rule laid down by this Court in the *Gypsum* case, *supra*.

Because of the substantial number of actions which are tried to the court and thereafter appealed to the Court of Appeals for the Tenth Circuit, it is important to the administration of justice that the decision below be corrected so that appellate review of findings made by a court in a non-jury case be reviewed according to the clearly erroneous rule set forth in Rule 52(a) rather than such

2. See *Corbett v. Hallwell*, 123 F 2d 331 (C.C.A. 2d 1941), where the Court held that findings supported by substantial evidence cannot be clearly erroneous.

cases being reviewed according to the rule applicable to findings of fact made by a jury.

Had the correct rule been applied in the appellate review of this decision, it is submitted that the Court would have found that the finding of the Commissioners to the effect that the landowner did not establish the reasonable probability of procuring a change of zoning should have been set aside as against the clear weight of the evidence.

II

This decision involved uncontradicted testimony on the probability of rezoning. Nevertheless, the Commissioners rejected this testimony on the basis that the burden of persuasion had not been met. Both the trial and appellate courts were apparently of the view that even though such evidence was uncontradicted it was not free to disturb the findings of the Commissioners. We therefore have involved here the extent an appellate court may go in making its own findings from stipulated or undisputed evidence (free from Rule 52(a)), particularly regarding facts based on opinion evidence. In this respect there appears to be a good deal of conflict between the different Circuits and even conflict within the various Circuits. Thus in *Texas Co. v. R. O'Brien & Co.*, 242 F 2d 526 (C.C.A. 5, 1957), the Court stated:

> "Some courts have held Rule 52(a) not to apply where the findings below were based upon stipulated or undisputed subsidiary facts."

In a footnote to this statement the Court noted:

> "There is a singular lack of unanimity on this point not only between, but within, individual Circuits. . . ."

Thus in *Home Indemnity Co. of New York* v. *Standard Accident Insurance Co.*, 167 F.2d 919 (C.C.A. 9, 1948), the appellate court stated:

> "The first two of these findings are inferences from undisputed testimony or documentary evidence, from which we are in as good a position to draw deductions as was the court below."

For some other decisions where the appellate court indicated that it was in as good a position to make findings from deposition or documentary or undisputed evidence as was the trial court see *Kraft Food Co.* v. *Commissioner of Internal Revenue*, 232 F.2d 118 (C.A. 2, 1956); *Ellison* v. *Frank*, 245 F.2d 837 (C.C.A. 9, 1957); *Chicago, Burlington and Quincy R. Co.* v. *U. S.*, 221 F.2d 811 (C.C.A. 7, 1955); *Benrose Fabrics Corp.* v. *Rosenstein*, 183 F.2d 355 (C.C.A. 7, 1950); *Wiggington* v. *Order of United Commercial Travelers*, 126 F.2d 659 (C.C.A. 7, 1942); and *Orris* v. *Higgins*, 180 F.2d 537 (C.C.A. 2, 1950).

While some of the above cases involve stipulated and documentary evidence so that the credibility of witnesses is not involved, nevertheless where the fact in issue is not directly disputed and is not inherently improbable, or uncandid, and cross-examination does not develop any conflict or there could seem to be no question about the credibility of the witnesses as is here involved, the same rule would appear to be applicable, particularly since the evidence involves an expression of opinion as to the probability of rezoning. In this respect see the article written by The Honorable Leon Yankwich, United States District Judge for the District of California, entitled Findings in the Light of Recent Amendments to the Federal Rules of Civil Procedure, reported in *8 Federal Rules Decisions 271* where the author expresses the view that Rule 52(a) of necessity does not apply where the findings are

based on opinion evidence. Thus he states in a footnote on page 290 as follows:

> "Of necessity, the rule does not apply where the findings are based on opinion evidence or on depositions. When this is the case, the reviewing court may, and as a rule will, draw its own conclusions. Equitable Life Assurance Society v. Ireland, 9th Cir. 1941, 122 F.2d 462; Home Indemnity Co. v. Standard Accident Ins. Co., 9th Cir. 1948, 167 F.2d 919."

In *Cyc. of Fed. Proc.* Sec. 67.32 it is stated:

> "* * * In determining whether a finding in a non-jury case is correct the reviewing court may examine documentary evidence which it deems competent as a trial court to consider and testimony on which there is no conflict."

On the other hand the Eighth Circuit Court of Appeals has stated a different rule. *Commercial Standard Ins. Co. v. Maryland Casualty Co.*, 248 F.2d 412 (C.C.A. 8, 1957). In this case it was contended that the Court of Appeals was not bound by the provisions of Rule 52(a) because the trial was held on stipulated facts and uncontroverted testimony of the witnesses. The court rejected this contention, and stated as follows:

> "In a non-jury case this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. Citations."

In *U. S. v. Yotopoulos*, 180 F.2d 831 (C.C.A. 9, 1950), the Court held that an attempt of Appellate Court to draw an inference of fact constitutes a usurpation of the province of the trial court and this is true notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict.

The Court of Appeals for the Tenth Circuit has recognized, with respect to stipulated facts, that it is in as good a position to evaluate such facts as the trial court and has the duty to do so. *Lamb v. Interstate Commerce Commission*, 259 F.2d 353 (C.C.A. 10, 1958). Nevertheless, in the instant case the Court declined to evaluate the undisputed evidence on the probability of rezoning, and as a consequence the award was left standing although not based on the highest and best use for which the property was available. Had the Appellate Court made its own finding of fact from the undisputed evidence on probability of rezoning, then the Commissioner's award and findings could have been set aside as against the clear weight of the evidence.

Because of the apparent conflict among the Circuits and in the Circuits as to the scope of appellate review involving undisputed facts, it is submitted that this Court resolve such conflict and set forth the correct rule for an Appellate Court in determining facts involving uncontradicted testimony and particularly determine the scope of review of findings based on opinion evidence.

III

Since the Commissioners chose to disregard the uncontradicted testimony showing the reasonable possibility of the lands being rezoned for more profitable uses, the landowner was unable to establish the most profitable use to which the land could be put in the future, which would have a bearing on its market value. In this respect the decision is contrary to the rule of this Court as set forth in *McGoodwin v. U. S.*, 298 U.S. 342, 80 L. Ed. 1205, which holds that in condemnation cases the most profitable use for which land can probably be put in the reasonably near future may be shown and considered as bearing upon the

market value. Thus in effect the decision of the Court of Appeals and the trial Court deprives the landowner and petitioner of his property without just compensation in violation of the Fifth Amendment of the Constitution of the United States. In addition to this, the decision is in conflict with the decisions of this Court holding that uncontradicted testimony of witnesses could not be disregarded, *e. g., K.C.S.R. Co. v. C. H. Albers Commission Co.*, 223 U.S. 573, 56 L. Ed. 556, *International Shoe Co. v. F.T.C.*, 280 U.S. 291, 74 L. Ed. 431, *Chesapeake and O. R. Co. v. Martin*, 283 U.S. 209, 75 L. Ed. 985, *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 77 L. Ed. 819. It would also appear to be in conflict with some of the decisions from other circuits involving undisputed testimony, such as *Roth Office Equipment Co. v. Gallagher*, 172 F.2d 452 (C.C.A. 6, 1949), *Grace Bros. v. Commissioner of Internal Revenue*, 173 F.2d 170 (C.C.A. 9, 1949). In the latter opinion the Court stated:

> "It is axiomatic that uncontradicted testimony must be followed. (Citations.) The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or with testimony which is inherently improbable."

The Kansas Court, in which state this condemnation occurred, follows the same rule, and such rule was recognized and approved by the Court of Appeals in this decision, the Court quoting from *Gibbs v. Central Surety and Ins. Corp.*, 163 Kan. 252, 181 P.2d 498.

While the Court below recognized the validity of the rule nevertheless it affirmed the findings of the Commission on the basis of their statement that the burden of persuasion was not met. This the Court recognized the

applicability of the rule that uncontradicted testimony cannot be disregarded and then proceeded to disregard it. It is submitted that there is little value in having rules of law, have courts recognize them as applicable, pay lip service to them in their opinions, but then disregard the force of the rule in their decisions.

CONCLUSION.

The case involves issues of public importance, particularly issues involving appellate review in the United States Courts. It is submitted that the Court of Appeals for the Tenth Circuit is misconstruing the scope of appellate review as set forth in Rule 52(a), and that the Court is applying the same rule applicable to a review of findings made by a trial court in a non-jury case as to findings made by a jury. Because of the importance of appellate review in non-jury cases the Court below should be corrected and the proper construction of Rule 52(a) be made by this Court for the guidance of all Appellate Courts. Because of the apparent conflict among the Circuits and in the Circuits as to the extent an Appellate Court may go in making its own findings from documentary, or uncontradicted, or opinion evidence, the rule should be clarified for the guidance of all Appellate Courts in cases involving these circumstances. Lastly, the Court should set forth the correct rule regarding uncontradicted testimony, and the Court below corrected for disregarding such evidence so that a landowner may establish the highest and most profitable use to which his land could be put when it is taken under the power of eminent domain. For these reasons it is prayed that the petition for writ of certiorari to the Court of Appeals for the Tenth Circuit be granted.

Dated January, 1962.

Respectfully submitted,

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APPENDIX

APPENDIX A.

United States Court of Appeals

TENTH CIRCUIT.

SEPTEMBER TERM, 1961.

RAPID TRANSIT COMPANY, a Corporation,
Appellant.
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 6679

(Filed United States Court of Appeals, Tenth Circuit, October 10, 1961. Robert B. Cartwright, Clerk.)

Appeal from the United States District Court for the District of Kansas.

H. Gordon Angwin and Clifford L. Malone (Charles E. Jones and Ben W. Weir were with them on the brief) for Appellant.

Raymond N. Zagone (Ramsey Clark, Asst. Attorney General, Newell A. George, U. S. Attorney, Milton P.

Beach, Asst. U. S. Attorney, and Roger P. Marquis, were with him on the brief) for Appellee.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

The United States initiated this action in the United States District Court for the District of Kansas to condemn for its use some 5.21 acres of land located within the city of Lawrence, Kansas, 28 U.S.C.A. 1358. The sole original and now continuing issue was and is the ascertainment of just compensation to the owner, Rapid Transit Company, appellant. The government estimated the value of the acreage to be $16,000 and deposited such sum with the court, which sum was repudiated by the owner as being inadequate. The trial court then appointed commissioners to appraise and fix the value of the property taken. After full hearing, the commissioners set the fair market value of the property to be $17,500 as of the time of taking and the trial court, although indicating some personal dissatisfaction with the amount set, approved and adopted the report of the commissioners as capable of support under the evidence and therefore binding upon the court[1]

The trial court's recognition that the findings of the commissioners must be upheld unless clearly erroneous is manifestly a correct limitation upon that court's review of such findings. *Leader Clothing Co. v. Fidelity & Cas-*

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1 The trial court stated that "while I have the utmost confidence in the integrity, ability and experience of the members of the Commission, it is quite likely that on the same evidence I would have found the value of the tract to have been greater than that found by the Commissioners; but since I do not and cannot hold that their findings are clearly erroneous I am not permitted to substitute my conclusion for theirs."

ualty Co. of N.Y., 10 Cir., 237 F.2d 7. And, in turn, we recognize the same limitation upon appellate review. This court will not set aside the judgment of a trial court, based upon findings, unless a review of the evidence results in a definite and firm conviction that substantial justice has been defeated by a manifest mistake. *H. F. Wilcox Oil & Gas Co. v. Diffie*, 10 Cir., 186 F.2d 683; *Onego Corporation v. United States* (decided , , 1961).

Although the form of the landowner's appeal has several facets it is essentially an attack upon the commissioners' finding that

> "* * * the landowner did not sustain the burden of establishing the fact that there was reasonable probability a change could be made in the Zoning Ordinance of the City of Lawrence, permitting the tract taken to be used for multiple dwelling purposes in the near future."

and the conclusion that

> "At the time of taking the land by the United States of America on February 6, 1958, the best and most advantageous use of said land was * * * for single family residences in Zone A as described by the Zoning Ordinances of the City of Lawrence * * *"

At the time of actual taking the land was zoned as "A" restricting its then use to single family residences; an attempt to rezone to "D" had failed[2] and no other efforts to obtain reclassification had been made. However the landowner called several witnesses who were familiar with the policy and attitude of the Lawrence zoning commission

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2 Class "D" allows commercial development. Apparently the "D" zoning was refused because of an informal but pre-existing agreement between officials of the City of Lawrence and officials of the University of Kansas. The subject acreage is near the property of that institution.

each of whom expressed the opinion that an application to rezone to "C" (multiple dwellings) would be favorably considered and that the land had a higher potential for successful development as a site for two and four unit housing. This opinion evidence indicating a reasonable probability that a favorable rezoning classification could be obtained was not directly contradicted and was a proper and indeed necessary factor for the trier of the facts to consider in determining the value of the condemned land. *McCandless* v. *United States*, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205. The uncontradicted nature of this testimony leads the landowner to his contention that the basic finding and conclusion of the Commissioners that the highest use of the subject acreage was Zone "A" are clearly erroneous. We agree that the correct rule in such regard is stated by the Supreme Court of Kansas in *Gibbs* v. *Central Surety and Ins. Corporation*, 163 Kan. 252, 181 P.2d 498, as follows:

> "Ordinarily the trier of the fact is not required to believe the testimony of any witness merely because there is no direct testimony to controvert it, but where plaintiff produces two witnesses who testify on every material element of plaintiff's cause of action, and such testimony is not inherently improbable or uncandid, and the cross-examination does not develop any conflict, and the defendant produces no testimony in opposition, the trier of the fact is not justified in arbitrarily or capriciously disregarding such testimony."

We cannot say that the findings and conclusions of the Commissioners are arbitrary or capricious as a matter of law for the record indicates that the first report of the Commissioners was rejected by the trial judge as not "sufficiently comprehensive" and that the matter was resubmitted to the Commissioners with correct and specific in-

structions to consider the force of the testimony relating to the possibility of rezoning and also the testimony relating to a comparable sale. The findings and conclusions now questioned show that such consideration was given to the landowner's contentions but that the burden of persuasion was not met.[3] The ultimate award, however, was greater than the amount asserted by government witnesses to be adequate compensation for "A" land and may reflect a view that rezoning, while not sufficiently imminent to substantially increase the pertinent market price of the land, was a remote consideration in the amount of compensation. Since the award was well within the range of credible testimony this court may not reweigh the evidence or retry the facts, *Stephens v. United States*, 5 Cir., 235 F.2d 467, for as we said in *Buena Vista Homes, Inc., v. United States*, 10 Cir., 281 F.2d 476, 480:

> "* * * This court will not assume the function of retrying the facts. A finding based on sharply conflicting evidence is conclusively binding here. In the case at bar there is substantial evidence of value both lower and higher than that fixed by the commission. We may not reweigh that evidence in a de novo review or reverse because the commission adopted a value nearer that of the Government experts than that of the appraisers for Buena Vista. * * *"

AFFIRMED.

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3. The report of the commissioners indicated that a personal view of the lands had played an important part in arriving at what constituted a proper award. The weight to be given to this factor as against opinion evidence is exclusively for the trier of the facts.

Judgment.

Eleventh Day, September Term, Tuesday, October 10th, 1961.

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Order Denying Petition for Rehearing En Banc.

First Day, November Term, Monday, November 13th, 1961.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing *en banc* herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

Order Denying Petition for Rehearing.

First Day, November Term, Monday, November 13th, 1961.

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.